

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

NO. _____

HY-UTSE-MIL-KIN,
Appellant.

vs. (18,824)

PHILOME SMITH,
Appellee.

REPLY BRIEF OF APPELLEE.

I.

It is now urged by counsel for the appellant that the complaint in this suit does not state facts sufficient to constitute a cause of suit for the reason that it does not allege that the claimant was residing upon the Umatilla Indian Reservation on the 3rd day of March 1885 the date when the Act of Congress, under which the allotments were

made, was enacted. This is the first time in the trial of this case, that this point has been raised but it was fully considered by the Department of the Interior while it was pending there, and after very careful and repeated examinations the Departmen held that the Act did not require the allottees to have been actually residing on the reservation at the time. That such a conclusion was correct seems very obvious in the light of the opinion of Assistant Attorney General, Wm. Little. (See printed record pages 112 to 120).

The Act of 1885 must be construed in convention with the original treaty with the Indians and this Court must answer that it was passed with a perfect knowledge and understanding of the treaty and the manner of its enforcement by the Government, and also with a full knowledge of the location and residence of the Indians.

The Department decided and held that under the treaty of 1855 the individual Indians had a right to occupy with others any of the public lands theretofore occupied by them. That construction of the treaty is undoubtedly correct. In fact it is the exact language of the treaty. But the reservation was to be the residence place of the bands of Indians to the complete exclusion of the whites. The Act uses the word "residing" as the verb following the noun bands. It refers to the bands and not to the individual Indians composing the band. The language of the Act does not say expressly or by implication that the allotments must be made only to those residing on the reservation at the time the Act took effect. The evident true meaning is that any individual member of either of the bands LOCATED upon the reservation should be allotted. As shown by the decision of the Department above referred to, when the commissioners appointed to carry the Act into effect, went upon the reservation they found the greater part of the Indians residing off of it and messengers were sent out all over the country to tell them to come in, and be enrolled and to select their lands. Evidently Congress intended that the allottees should be residing on the reservation at the time they were allotted. Had Congress intended to confine

the allotments to those residing on the reservation at the time of the passage of the Act it would have said so in unequivocal terms: it would have used some expression like this, "residing upon the Umatilla Reservation, in the State of Oregon at this time" or "when this Act takes effect." Or it would have provided that no Indian now residing off the reservation shall be entitled to allotment.

Upon this point this case in very similar to the case of Sloan vs. United States 118 Fed. 283.

In that case the Court construed the 5th section of the Act of 1882 (22 Stat. 341) which is as follows: "That with the consent of said Indians as aforesaid, the Secretary of the Interior be and is hereby authorized, either through the agent of said tribe or such other persons as he may designate to allot the land lying east of the right of way granted to the Sioux City Nebraska Railroad Company, under the agreement of July 27, 1880, approved by the Acting Secretary of the Interior July 27, 1880, in severalty to the Indians of said tribe."

The counsel for the United States in that case claimed that the allotments under that Act and under that section of the Act should have been actually residing on the reservation at the time the Act was passed and judge Shiras, in passing upon the question says "A liberal construction should be given the Act, in order, to effectuate its purposes, which was to encourage the Indians to break up the tribal relations and adopt the habits of civilized life; and persons of mixed blood, who, although not living on the reservation, were recognized by the tribe in council or the equivalent, may properly be given allotments, but on the question whether they have been recognized the Courts will follow the ruling of the land department."

Now these are the undisputed facts in the case at bar,

FIRST:—Philome Smith, the plaintiff and appellee is a full blood Indian woman.

SECOND—She was born within the United State at or near what is now known as Wallula in the state of Washington.

THIRD—Her mother was an Indian woman belonging to the Walla Wall band of Indians, and her father was an Iroquois Indian at the time in the employment of the Hudson Bay Company.

FOURTH—Mrs. Smith and her mother never left the Oregon Country but remained in that part of the country where she was born and, in the Willamette Valley all their lives.

FIFTH—On the 10th day of January 1861 she was married to F. A. Smith, a white man, at The Dalles, Oregon at or near which place she resided with her husband until the spring of 1887 when she and her husband and family moved upon the Umatilla Indian Reservation.

SIXTH:—They settled upon the reservation, by the permission and authority of the United States Indian Agent there in charge of the reservation; at the instance and solicitation of the cheif of the Walla Walla band of Indians and with the approval of at least one council of the Indians.

SEVENTH:—Some five years prior to the allotment, she selected the land in dispute, as her allotment and in doing so had the aid and assistance of Homily, the cheif of the Walla Walla band, and the approval of the agent.

EIGHT:—At the time she made the selection the land was unoccupied and she immediatley took possession of it and improved it to the extent of seven or eight hundred dollars.

NINTH:—She was in actual possession of the land in 1891 and 1892 when these allotments were made.

TENTH:—She went to the commissioners and asked to have the land allotted to her and they refused her because she had not been enrolled.

ELEVENTH:—Soon after she came upon the reservation she made application to be enrolled and the matter was

pending in the Department at the time the allotments were made.

TWELFTH:—The allotting commissioners disregarded her claims and allotted the land to the appellant.

THIRTEENTH:—In the contest which followed the Department of the Interior decreed that the appellee was entitled to an allotment, upon the Umatilla Reservation, but that her prior selection, settlement, possesion and improvements did not give her a prior right or equity in the land.

(For these findings see printed record pages 112 to 120.)

The counsel for the appellant also contends that the Act of August 15, 1894, is prospective and does not apply to cases of this kind, and that it relates to the future and is not retrospective in effects.

That point is clearly untenable and is not sustained by any of the authorities cited.

The rule is that all remedial legislation shall be liberally construed; particularly should this be so where new remedies are given, and with reference to the bestowal of jurisdiction on the Courts.

Larkin vs. Saffarans, pur Hammond J. 15 Fed. Rep. 150.

Galveston etc. R. Co. vs. Cowdry 11 Wall, U. S. 459.

U. S. vs. Burchard 125 U. S. 176.

Pugh vs. McCormack 14 Wall, 361.

Untermeyer vs. Freund 58, Fed. 205.

Stephens vs. Cherokee Nation 174 U. S. 445.

Crook vs. U. S. 138, U. S. 157.

McBurny vs. Carson 99, U. S. 567.

Larkin vs. Saffarans, 15 Fed. 147.

Harvey vs. Lord, 10 Fed. 238.

Congress had a right to take away the jurisdiction, which originally rested with the Secretary of the Interior and confer it upon some other tribunal.

Emblem vs. Lincoln Land Co., 94, Fed. 710.

Gordon vs. U. S., 7 Wall 188.

The intention of Congress in passing this law was remedial.

Sloan vs. U. S. 118, Fed. 283, (read page 290) and being remedial may be retrospective.

1 Kents Com. 455. If so, and if the appellant had vested rights, which we do not admit, such vested rights if any vested subject to the equity existing against them, and which the statute recognizes and enforces, 1 Kent Com. 466.

Goshen vs. Sonington 4 Conn. 209.

Wilkins vs. Leland 2 Peters 627.

Langdon vs. Strong, 2 Venwert 234.

Watson vs. Mercer, 8 Peters 88.

Remedial statutes, although retroactive, are construed liberally to accomplish the object, correct the evils and suppress the mischief aimed at.

6 Am. and E. Ency of L. 937.

As to the third point argued in the brief for appellant, to-wit: that the United States is a necessary party, we simply desire to call attention of the Court to the fact that this suit was commenced under the Act of Aug. 15, 1894 and that did not provide or require that the Government should be a party defendant and at that time there was no way provided for the bringing in the Government as a party defendant and it was not necessary because the Act itself provided that the Government should be bound by the proceedings between the parties, upon being certified to the Secretary of the Interior. The point is fully met by the decision of the Court of Appeals.

Where a right exists it is in the power of the legislature to provide a remedy.

6 Am. and E. Ency of L. (2nd) 946.

The Act of Congress of Aug. 15, 1894 effects the remedy and not the vested rights of either party. There is no vested right in a remedy.

6 Am. E. Ency of L. (2nd) 947.

Most respectfully submitted,
R. J. SLATER & J. T. HINKLE,
Attorneys for Appellee.